UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding Case No. 95A00014
KARNIVAL FASHION, INC., Respondent.	)	

FINAL DECISION AND ORDER
(July 20, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Patricia Gannon, Esq., for Complainant
Dan Brecher, Esq., for Respondent

I. PROCEDURAL HISTORY

On June 6, 1994, an Order was issued granting Complainant partial summary decision and setting forth the complete procedural history of this case. See 5 OCAHO 769 (1995). The Order granted Complainant summary decision on Counts I and II, comprising the entire substantive allegations at issue, but leaving the issue of civil money penalty open because Complainant's Motion for Summary Decision presented "no factual predicate on which to analyze the factors . . . ." Id. at 3.

In response to my request for memoranda or briefs analyzing the five statutory factors required to be considered upon adjudicating a civil money penalty, Complainant filed a Motion on June 21, 1995 [hereinafter Complainant's Motion]. No response was filed by Respondent although the deadline for a timely response has passed. Accordingly, only Complainant's Motion will be analyzed.

II. DISCUSSION

The statutory minimum civil money penalty in a § 1324a paperwork case is $100; the maximum $1000. On assessing and adjudicating the penalty, five factors must be taken into consideration. See 8 U.S.C. § 1324a(e)(5). The factors are size of the business, good faith, seriousness, unauthorized aliens and previous violations. In weighing each of these factors, I utilize a judgmental and not a formula approach. See, e.g., United States v. Williams Produce, 5 OCAHO 730 (1995), appeal filed, No. 95-8316 (11th Cir. 1995); United States v. King's Produce, 4 OCAHO 592 (1994); United States v. Giannini Landscaping Inc., 3 OCAHO 573

(1993). The result is that each factor's significance is based on the facts of a specific case, although the guidance of IRCA (Immigration Reform and Control Act) jurisprudence as precedent is not ignored.

A. Size of Business

Although IRCA and implementing regulations provide no guidelines for determining business size, previous OCAHO cases dealing with § 1324a violations have discussed the following factors: "(1) the number of individuals employed by the enterprise, (2) gross profit of the enterprise, (3) assets and liabilities, (4) nature of the ownership, (5) length of time in business, and (6) nature and scope of the business facilities." Williams at 6 (citing Giannini Landscaping Inc.; United States v. Davis Nursery, Inc., 4 OCAHO 694 (1994)).

Complainant states that "[i]n the present case, . . . [it] does not possess complete or reliable information regarding any of these six factors other than the number of employees. Cplt. Motion at 2. According to Complainant, Respondent employed 58 individuals at the time of the I-9 inspection. This fact, as well as the fact that "Respondent had sufficient resources [in the form of managerial staff] at its disposal in order to comply with its obligations under IRCA," requires that "Respondent's business should be found to be either an aggravating or a non-mitigating factor." Id. at 3.

The fact that Respondent employed 58 employees does not in and of itself persuade me to conclude that Respondent is either a large or small business. As a general principle, an establishment with 58 employees is not necessarily a large enterprise; depending on its line of business, it may well be medium-sized. Overall, however, the lack of evidence available to assess this factor leads me to conclude that size is neither mitigating nor aggravating. Accordingly, having considered this factor, I find its application sufficiently inconclusive as to have any impact on the outcome.

B. Good Faith of Employer

OCAHO caselaw holds that "the mere fact of paperwork violations is insufficient to show a 'lack of good faith' for penalty purposes." United States v. Minaco Fashions, Inc., 3 OCAHO 587 at 7 (1993) (citing United States v. Valadares, 2 OCAHO 316 (1991)). "Rather, to demonstrate 'lack of good faith' the record must show culpable behavior beyond mere failure of compliance." Minaco, 3 OCAHO 587 at 7 (citing United States v. Honeybake Farms, Inc., 2 OCAHO 311 (1991)).

Complainant asserts that Respondent acted in bad faith with regard to its IRCA obligations because "it failed to complete Forms I-9 for seventeen employees and improperly completed Forms I-9 for twenty two employees." Cplt. Motion at 3. According to

Complainant, "[t]his means that, despite its apparent awareness of the mandates of IRCA, Respondent complied with the law in only nineteen of fifty eight hires, which is a compliance rate of under thirty three percent." Id.

I agree. As stated in Williams, the fact that Respondent did produce most of the required Forms I-9, albeit deficient in content, shows that "its officer/managers knew of IRCA's requirement that an employer verify employment eligibility" yet still "failed to verify properly employment eligibility." 5 OCAHO 730 at 8. Accordingly, the factor of good faith will be applied to aggravate the civil money penalty.

C. Seriousness of Violations

With regard to paperwork violations, there are various degrees of seriousness. Davis Nursery, 4 OCAHO 694 at 21 (citing United States v. Felipe, Inc., 1 OCAHO 93 (1989)). "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." Davis Nursery, 4 OCAHO 694 at 21 (quoting United States v. Charles C.W. Wu, 3 OCAHO 434 at 2 (1992) (Modification of the Decision and Order of Administrative Law Judge)). Respondent has been found liable for failing to prepare and/or make available Forms I-9 for seventeen employees. As these violations are serious, I will apply this factor to aggravate the civil money penalty.

Count II of the Complaint charges Respondent with failing timely to complete the Form I-9 for 22 individuals. Although I agree with Complainant that these violations are serious because "[f]ailure to timely complete [sic] Forms I-9 greatly increases the likelihood that an employer will hire unauthorized workers," I do not find these violations to be as serious as the failure to prepare and/or make available violations in Count I. Cplt. Motion at 4. Therefore, the civil money penalty will be mitigated slightly to reflect a difference between Counts I and II.

D. Unauthorized Aliens

Complainant states that "Respondent employed twenty three unauthorized aliens at the time of inspection . . ., account[ing] for more than one third of Respondent's work force." Id. According to Complainant, "[t]he high percentage of unauthorized aliens in Respondent's employ underscores Respondent's failure to comply with the verification requirements of IRCA . . . [and] should be considered aggravating." Id.

I agree with Complainant that the employment of unauthorized aliens is generally considered an aggravating factor. See, e.g., United States v. Fox, 5 OCAHO 756 at 3-4 (1995). However, Counts I and II, for which Respondent was found liable, do not allege

substantive violations of § 1324a; instead, they list paperwork violations. Compare 8 U.S.C. § 1324a(a)(1)(A) with § 1324a(a)(1)(B). In addition, as tempting as it is to aggravate the civil money penalty, particularly where Respondent did not submit any information to the contrary, I cannot do so where, as here, Complainant submits no documentary evidence in support of its assertions that Respondent employed unauthorized aliens.[2] As I have stated in the past, "'I do not consider uncharged events as evidence of any further violations.'" Williams Produce, 5 OCAHO 730 at 9. Accordingly, absent convincing evidence that Respondent hired unauthorized aliens, I will neither mitigate nor aggravate the civil money penalty based on this factor.

E. Previous § 1324a Violations

As "Complainant concedes that Respondent had not previously been cited for a violation of 8 U.S.C. section 1324a," this factor will mitigate in Respondent's favor. Cplt. Motion at 4. See also Giannini, 3 OCAHO 573 at 8.

F. Effect of Factors Weighed Together

In determining the appropriate level of civil money penalty, I have considered the range of options between the statutory floor and the amounts assessed by INS. While the lack of previous § 1324a violations does not support a finding for the penalty assessed by INS, the aggravating factors of seriousness and lack of good faith do not support adjudication at the statutory minimum. In addition, due to the relatively more serious nature of violations involving failure to prepare and/or make available in Count I, I adjudge a higher amount for these violations than for the violations involving failure to complete section 2 of the Form I-9 within three days of hire as alleged in Count II.[3]

III. ULTIMATE FINDINGS, CONCLUSIONS AND ORDER

I have considered the Complaint, Answer, pleadings, briefs and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied.

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2 Complainant does attach to its Motion a declaration from INS Special Agent William Riley who attests to having found 22 unauthorized aliens employed by Respondent at the time Riley inspected Respondent's premises. This evidence, however, without a finding of liability against Respondent for employing unauthorized aliens, is insufficient to persuade me that the civil money penalty should be aggravated based on this factor.

3 INS proposed a differentiated penalty as among several of the individuals listed in Count II but omitted any explanation to account for such treatment. This Decision and Order adjudiciates the penalty in an identical amount for each Count II individual.

Accordingly, as previously found and more fully explained above, I determine and conclude upon a preponderance of the evidence:

1. That, having found Respondent liable for two counts of violating 8 U.S.C. § 1324a(a)(1)(B),[4] I adjudge civil money penalties in the following amounts:

Count I, $400 as to each of the 17 named individuals, $6,800
Count II, $300 as to each of the 22 named individuals, $6,600

For a total civil money penalty of $13,400.

This Final Decision and Order is the final action of the judge in accordance with 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.52(c)(iv). As provided at 28 C.F.R. § 68.53(a)(2), this action shall become the final order of the Attorney General unless, within thirty days from the date of this Final Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to parties adversely affected. See 8 U.S.C. §§ 1324a(e)(7), (8) and 28 C.F.R. § 68.53.

SO ORDERED.

Dated and entered this 20th day of July, 1995.

Marvin H. Morse
Administrative Law Judge

4 See 5 OCAHO 769 (1995).

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order were mailed first class, postage prepaid this 20th day of July, 1995 addressed as follows:

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